

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Applications of AT&T Inc. and Deutsche)	WT Docket No. 11-65
Telekom AG)	
)	
For Consent To Assign Or Transfer Control)	
Of Licenses and Authorizations)	

COMPTEL REPLY TO JOINT OPPOSITION TO PETITION TO DENY

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COMPTEL, through undersigned counsel, hereby submits its reply to the Joint Opposition of AT&T, Deutsche Telekom and T-Mobile USA (hereinafter collectively "AT&T") to the petitions to deny their Applications for approval of the sale of T-Mobile USA to AT&T. AT&T has not met its burden of proving that any potential public interest benefits of the proposed acquisition will outweigh the public interest harms and that on balance, the acquisition will serve the public, interest, convenience and necessity. For this reason, the Commission must deny the Applications for consent to transfer control of T-Mobile USA from Deutsche Telekom to AT&T.

Introduction and Summary

AT&T devotes a substantial part of its opposition to the spectrum and capacity issues that it cites as the reason for its need to acquire T-Mobile.¹ What it does not address, in other than the most general and non-market specific terms, is the competitive harm from the significant increase in horizontal market concentration in the mobile telephony/broadband services market

¹ Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions To Deny And Reply To Comments at 19-93; 179-191.

that will result from the acquisition or the competitive harm to the market for backhaul services that will result from AT&T's absorption of what is today the second largest non-ILEC affiliated purchaser of backhaul facilities.

AT&T describes the public interest benefits that its acquisition of T-Mobile will produce as including relief from the capacity constraints that its network is currently experiencing, the ability to use spectrum more efficiently through the integration of T-Mobile's network, the ability to compete more efficiently and effectively, and the ability to improve the quality of service it provides to its customers. Viewed in the abstract, these benefits may seem like a pretty good deal. But the Commission cannot view the alleged benefits from this transaction in the abstract. Instead, it must balance those benefits against the harm to competition and the public interest that will be produced by allowing AT&T to increase its share of the national mobile telephony/broadband market to almost 43 percent, reduce the number of national wireless providers from four to three, eliminate a major purchaser of competitive backhaul services in AT&T's ILEC footprint, thereby jeopardizing competition in the special access market, and increase AT&T's ability and incentive to engage in unilateral and coordinated anticompetitive tactics in both the upstream backhaul market and the downstream mobile telephony/broadband market. The Commission has concluded that the limited supply of wireless spectrum could limit the growth of wireless broadband and is "likely to limit competitive entry, raise costs, lower service quality and have other negative impacts on business and consumers."² Approval of this transaction will likely do the same.

² *In the Matter of Inquiry Concerning The Deployment of Advanced Telecommunications Capacity To All Americans In A Reasonably And Timely Fashion And Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of The Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh

I. AT&T Has Failed To Show That The Increase In Horizontal Market Concentration Will Not Harm Competition

As COMPTEL demonstrated in its Petition to Deny, AT&T's acquisition of its direct competitor, T-Mobile, will not preserve or enhance competition or promote a diversity of license holdings, but will instead increase and enhance AT&T's dominance in the mobile telephony/broadband market on both the national and local levels, increase AT&T's wireless license holdings, reduce the number of national competitors from four to three, and eliminate a non-ILEC affiliated wireless license holder. These consequences of the acquisition will impede the objective of promoting economic opportunity and competition by avoiding excessive concentration of licenses that Congress has charged the Commission with pursuing in awarding wireless licenses.³

The Commission has repeatedly stated that a transaction that creates or enhances market power or facilitates its use is unlikely to serve the public interest.⁴ This transaction will do both. AT&T is well aware that in analyzing whether there will be a significant increase in horizontal market concentration as a result of an acquisition, the Commission applies a two-part initial screen designed to eliminate from further review any markets in which the acquisition is not

Broadband Progress Report And Order on Reconsideration, FCC 11-78 at ¶66 (rel. May 20, 2011).

³ 47 U.S.C. §309(j)(3)(B).

⁴ See, e.g., *In the Matter of Applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-194, Memorandum Opinion and Order, FCC 10-116 at ¶31 (rel. June 22, 2010) ("*AT&T/Verizon Order*"); *In the Matter of the Applications of AT&T, Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, FCC 07-196 at ¶15 (rel. Nov. 19, 2007); *In the Matter of Applications of AT&T Wireless, Inc. and Cingular Wireless For Consent To Transfer Control Of Licenses And Authorizations*, WT Docket No. 04-70, Memorandum Opinion And Order, FCC 04-255 at ¶68 (rel. Oct. 26, 2004).

likely to produce competitive harm.⁵ The Commission looks at the current market concentration, the post-transaction market concentration and the increase in concentration likely to result from the transaction, as measured by the Herfindahl-Hirschman Index (“HHI”), and at the spectrum holdings the combined company will have for the provision of mobile telephony/broadband service on a market-by-market basis.⁶

AT&T’s acquisition of T-Mobile will trigger both the HHI screen⁷ and the spectrum screen⁸ in numerous Cellular Market Areas (“CMAs”) and Component Economic Areas (“CEAs”). Although the application of these screens clearly signals the need for a detailed study and review of the competitive conditions in many local markets, AT&T presented no particularized evidence of its own market share or that of any of the surviving mobile telephony/broadband service providers, the number of those rival providers that can offer competitive national service plans, the amount of spectrum held by those rival providers or the coverage of those rival providers’ respective networks in any of the CMAs or CEAs where the screens are exceeded. At a minimum, such information is required to conduct an analysis of AT&T’s ability, post-acquisition, to engage in unilateral or coordinated anticompetitive behavior in any or all of the local markets where the HHI and/or spectrum screens are triggered.⁹

⁵ *AT&T/Verizon Order* at ¶42.

⁶ *Id.* at ¶33.

⁷ *See Sprint Petition To Deny* at ¶79.

⁸ AT&T Public Interest Statement at 76 and Appendix A.

⁹ *AT&T/Verizon Order* at ¶47.

While all of the data necessary to perform such an analysis is readily available to AT&T,¹⁰ and it is intimately familiar with the methodology the Commission uses to evaluate the state of wireless competition in local markets,¹¹ AT&T chose not to present market specific data either in its Application or in its Joint Opposition to the Petitions to Deny that might demonstrate that the significant increase in horizontal market concentration that will result from the acquisition is not likely to lead to unilateral or coordinated anticompetitive activity. Instead, AT&T reiterated its non-market specific allegations that the mobile telephony/broadband service market is highly competitive, that pricing is dynamic, that T-Mobile is not a very effective competitor¹² and that other carriers “can readily fill any competitive gap T-Mobile leaves upon the completion of this transaction.”¹³

Such broad generalizations are insufficient to show that the acquisition will not result in anticompetitive harms in any or all of the CEAs or CMAs where the HHI and spectrum screens are exceeded. AT&T’s failure to affirmatively present market specific evidence can lead to only one conclusion – that such evidence would show that the local markets are highly concentrated and that such concentration will harm competition. *See, Interstate Circuit, Inc. v U.S.*, 306 U.S.

¹⁰ The Commission calculates market shares and HHIs from data compiled in the NRUF database, network coverage from American Roamer and U.S.Census Data and spectrum holdings from its licensing databases. It also evaluates data from the LNP database. AT&T/Verizon Order at ¶47.

¹¹ *See e.g., AT&T/Verizon Order* at ¶¶47-51; *In the Matter of the Applications of AT&T, Inc. and Dobson Communications Corporation For Consent To Transfer Control Of Licenses And Authorizations*, WT Docket No. 07-153, Memorandum Opinion and Order, FCC 07-196 at ¶¶51-57 (rel. Nov. 19, 2007); *In the Matter of the Applications of AT&T, Inc. and Centennial Communications Corp. For Consent To Transfer Control Of Licenses, Authorizations and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Memorandum Opinion and Order, FCC 09-97 at ¶¶ 75-86 (rel. Nov. 5, 2009).

¹² Joint Opposition at 126-143.

¹³ *Id.* at 131.

208, 226 (1939) (production of weak evidence when strong is available can only lead to the conclusion that the strong evidence would have been adverse). Moreover, AT&T's contention that competitors can fill the gap caused by T-Mobile's departure from the market makes no sense. AT&T's wholesale acquisition of T-Mobile's spectrum, network assets, and customers will do anything but create market opportunities for AT&T's competitors. The "gap" caused by T-Mobile's departure from the market will be filled by AT&T, the largest mobile telephony/broadband provider in the country.

AT&T's election not to present a market-by-market analysis showing that the increase in horizontal concentration that will result from the acquisition will not harm competition should be fatal to the success of its Applications. AT&T has failed to meet its burden of proof and the Applications should be denied.

II. The Commission Must Reject AT&T's Attempts To Minimize The Impact Of The Acquisition On Competition In The Backhaul Market

COMPTEL demonstrated in its Petition To Deny that AT&T's acquisition of T-Mobile will harm competition in the special access backhaul market for at least two reasons. First, T-Mobile is a major purchaser of backhaul facilities from competitive providers. AT&T has stated its intent to move T-Mobile's backhaul traffic onto its own transport network wherever possible,¹⁴ a post-transaction effect that raises a serious concern about the anticompetitive consequences of the vertical aspects of the acquisition in the 22 states where AT&T serves as the incumbent local exchange carrier. The loss of such a major customer will increase the difficulty of competitive providers to achieve the minimum viable scale they need to justify the enormous

¹⁴ As one of the public interest benefits of the acquisition, AT&T cited the significant cost savings the combined company will realize "from a reduction in interconnection and toll expenses *as a result of switching to existing AT&T facilities where possible for transport.*" Moore Declaration at ¶34 (emphasis added).

investment required to deploy alternative special access facilities and will create a risk that competitive providers will either exit the special access market altogether or significantly scale back their investment in special access facilities.¹⁵ Second, as competition is hobbled in the backhaul market, AT&T will be able to raise its downstream wireless rivals' costs of doing business by raising the rates it charges them for backhaul.¹⁶

AT&T denies that there will be any anticompetitive vertical effects from its acquisition of T-Mobile for several reasons, none of which is convincing. Just as it downplays the significance of T-Mobile as a mobile telephony/broadband service competitor, AT&T attempts to downplay the harm to competition that will result post-acquisition from AT&T's transfer of T-Mobile's backhaul traffic carried by competitors to its own network and from its ability and incentive to raise its downstream rivals' costs.¹⁷ The Commission must not be taken in by AT&T.

A. The Loss of T-Mobile's Business Will Harm Competition In The Backhaul Market

COMPTTEL demonstrated in its Petition to Deny that AT&T and Verizon continue to supply the majority of T-Mobile's backhaul services.¹⁸ Nonetheless, T-Mobile has contracted for competitive backhaul services, including with COMPTTEL members, at approximately 20 percent of its cell sites.¹⁹ In addition to traditional TDM-based special access services, T-Mobile

¹⁵ COMPTTEL Petition To Deny at 25-28.

¹⁶ *Id.* at 22-25, 29-30.

¹⁷ Joint Opposition at 162-177.

¹⁸ COMPTTEL Petition to Deny at 25 citing Letter dated May 6, 2010 from Kathleen O'Brien Ham, T-Mobile USA Inc., to Marlene Dortch, FCC, filed in WC Docket No. 05-25.

¹⁹ *Id.*

also uses Ethernet over fiber special access services for backhaul.²⁰ As AT&T acknowledges, T-Mobile has contracts in different cities with ILECs, cable operators, alternative fiber providers and utility company subsidiaries to provide Ethernet over fiber backhaul to and from its cell sites.²¹ T-Mobile estimates that non-ILEC access providers now provide connections to more than half of its 3G/4G capable cell sites.²² According to T-Mobile, the majority of its Ethernet over fiber contracts with non-ILEC providers “still have several years remaining” on them.²³

Elimination of the second largest non-ILEC affiliated purchaser of wireless backhaul cannot help but reduce competition in the backhaul market in the 22 states where AT&T serves as the incumbent wireline carrier, thereby harming competitive providers of backhaul as well as all purchasers of dedicated access services who will likely be left with fewer choices in services and providers.²⁴ AT&T’s unsupported contention that T-Mobile is not a “substantial enough purchaser of [backhaul] services” that its departure from the market would “harm competition for backhaul services”²⁵ is entitled to no weight. The volume of T-Mobile’s backhaul purchases from competitive providers may be insubstantial to a company with \$124 billion in annual operating revenues like AT&T,²⁶ but it is not insubstantial to the non-incumbent competitive

²⁰ May 6, 2010 Letter from Kathleen O’Brien Ham to Marlene Dortch filed in WC Docket No. 05-25.

²¹ Joint Opposition at 167; see also, Mayo Declaration at ¶¶6-7.

²² Joint Opposition at 167; Mayo Declaration at ¶8.

²³ Mayo Declaration at ¶7.

²⁴ COMPTTEL Petition To Deny at 25-30.

²⁵ Joint Opposition at 162-163.

²⁶ See AT&T 2010 Annual Report at 30 available at <http://www.att.com/gen/investor-relations?pid=19234>.

backhaul providers that serve T-Mobile and that will suffer the negative economic consequences from the loss of its business. Ironically, in arguing that it would have no motive to raise its rivals' rates for backhaul, AT&T's economists state that because special access is characterized by high fixed costs and low marginal costs, the "loss of the margin on backhaul services when a customer switches to a competing provider (or reduces its purchases) is significant to AT&T."²⁷ AT&T cannot have it both ways. If the loss of the margin on backhaul services when a customer switches to a competing provider or reduces its purchases is significant to AT&T, the loss of T-Mobile's backhaul business in AT&T's 22 state ILEC region will be significant to the competitive providers that provision that backhaul.

The competitive carriers that currently provide backhaul to T-Mobile or that could compete for its backhaul business in the future will be foreclosed from this business in AT&T's 22 state ILEC territory if the transaction is approved and that foreclosure will have a negative impact on the market. With the loss of T-Mobile as a potential customer, the incentive for competitors to assume the high fixed costs of deploying more efficient and economic transport facilities will diminish because AT&T – the largest potential customer of backhaul facilities – will forgo purchasing from competitive providers in favor of using its own network facilities. With reduced competition in the backhaul market, innovation will be delayed and the public interest will be harmed.

In an apparent sidestep from the position asserted in its Application that it would bring T-Mobile's traffic onto its own transport facilities where possible, AT&T alleges in its Joint Opposition that it will assume T-Mobile's contracts with third-party backhaul providers.²⁸ As a

²⁷ Willig, *et al.*, Declaration at ¶102.

²⁸ Joint Opposition at 172.

result, it contends that “any effect the absence of T-Mobile USA’s business might have on alternative backhaul suppliers will emerge only gradually.”²⁹ At the same time, AT&T reaffirms that shifting T-Mobile’s purchased backhaul to its own network facilities will create efficiencies by eliminating “double marginalization.”³⁰ It is unclear whether by “assuming” T-Mobile’s contracts, AT&T means that it will continue to purchase backhaul facilities from the third party providers for the time remaining on the contracts or whether it will invoke contract clauses that may allow it to terminate the contracts early. In either event, the absence of T-Mobile’s business will damage the competitive backhaul market and may strand investments where competitors constructed facilities for use by T-Mobile and those facilities are not adaptable for use by other customers.³¹ The fact that some COMPTTEL members now compete vigorously for backhaul does not mean they will be able to continue doing so once AT&T absorbs T-Mobile’s special access demand and removes it from the marketplace.

Any detriment to competition in the backhaul market that would flow from AT&T’s acquisition of T-Mobile would be contrary to the public interest. The Commission’s public interest analysis encompasses the broad objectives of the Act, “which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.”³² Especially in light of the nation’s commitment to promote the construction and funding of a public safety mobile

²⁹ Joint Opposition at 171.

³⁰ *Id* at 172, n. 306.

³¹ See COMPTTEL Petition To Deny at 28.

³² *AT&T/Verizon Order* at ¶23.

broadband network,³³ preserving and enhancing competition in the wireless backhaul market should assume heightened significance on the Commission's list of public interest priorities.

AT&T's acquisition of T-Mobile will do neither.

B. AT&T's Acquisition of T-Mobile Will Enhance Its Market Power And Its Ability To Act Anti-competitively

In its Petition To Deny, COMPTTEL explained in detail how AT&T's acquisition of T-Mobile will increase AT&T's ability to leverage its control over the special access market in its 22 state ILEC footprint to harm competition in the downstream retail wireless market.³⁴ AT&T responds to the concerns raised by COMPTTEL and similar concerns raised by others³⁵ by claiming that it lacks both the ability and the incentive to inflict harm in the retail wireless market. According to AT&T, the wireless backhaul market is intensely competitive and post-acquisition, the combined company would be unable to "leverage" its dominance in the backhaul market to harm the downstream retail wireless marketplace. AT&T also contends that the acquisition itself does not increase AT&T's incentive to raise the costs of its wireless rivals.³⁶ Neither of these arguments is persuasive.

As a preliminary matter, the Commission should reject AT&T's attempt to characterize fiber-based Ethernet backhaul services as something other than special access services. AT&T suggests that special access is limited to TDM-based facilities and that the higher capacity fiber-

³³ See FCC Chairman Julius Genachowski Remarks on a Nationwide Public Safety Network (June 16, 2011).

³⁴ *Id.* at 22-26.

³⁵ See e.g., PAETEC Petition To Deny at 11-17; Fibertech Comments at 2-5; Sprint Nextel Petition To Deny at 39-43.

³⁶ Joint Opposition at 163-164.

based Ethernet backhaul facilities sought by wireless carriers are not special access services.³⁷

The Commission, however, has never limited the special access product market definition to TDM-based services or to dedicated transmission facilities of a specific capacity. On the contrary, the Commission defines special access as a “dedicated transmission link between two locations, most often provisioned via high-capacity circuits”³⁸ and has specifically classified Ethernet services as high capacity special access services.³⁹

AT&T’s sleight of hand is important. In an effort to convince the Commission that competition in the backhaul market deprives AT&T of the ability to raise its rivals’ prices, AT&T asserts that the market for wireless backhaul is moving away from TDM-based services to Ethernet over fiber and that AT&T’s wireless rivals would have access to a number of alternative suppliers for backhaul in the event of a price increase, making such a price increase unprofitable. At the core of AT&T’s argument is its allegation that “ILECs such as AT&T and Verizon have no advantage in providing [Ethernet] services.”⁴⁰ This is a fallacy. AT&T and other ILECs have enormous advantages resulting from their economies of scale and scope. AT&T in particular possesses a ubiquitous network that has widely deployed fiber infrastructure between central offices and to customer locations, and it continues to push its fiber network further out from core business districts as it transitions its legacy network to U-Verse. It cannot

³⁷ *Id.* at 164-165.

³⁸ *See, In the Matter of the Applications of SBC Communications Inc. and AT&T Corp. for Approval of Transfer of Control*, 20 FCC Rcd 18290 ¶ 25 (2005) (“SBC/AT&T Merger Order”).

³⁹ *See, In the Matter of the Petition of AT&T, Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, 18711 at ¶ 9 (2007) (characterizing Gigabit Ethernet service as a high capacity special access service).

⁴⁰ Joint Opposition at 165.

be denied that it is far easier for AT&T to extend its existing network to provide fiber-based backhaul service to cell sites, especially cell sites where it has existing infrastructure and proximate access to its ubiquitous fiber transport network, than it is for new entrants to build fiber networks from scratch.⁴¹ As the Commission has acknowledged, fiber deployment is a difficult, time-consuming and expensive process for new entrants.⁴²

To support its position that it has no inherent advantages in supplying wireless backhaul, AT&T claims that it often does not prevail in competitive bidding processes for fiber backhaul opportunities. But AT&T fails to mention the sole source awards it receives without any bid. AT&T also omits any discussion of the fact that AT&T and the other ILECs are latecomers to the Ethernet backhaul market. Their late entry is not due to economic, technical or network considerations, but rather to the fact that any shift to Ethernet would cannibalize their profitable TDM-based services.⁴³ This is reminiscent of the industry's experience with DSL. The ILECs were slow and reluctant to deploy DSL technology and did so only in response to competitive deployment. The ILECs then used their enormous economies of scale and scope to overcome their late start and force most of their DSL competitors out of business.

AT&T further ignores the fact that it already has the captive demand of wireless providers for which AT&T provides the last mile TDM-based service. Those customers are often

⁴¹ AT&T argues that the cable companies provide ample competition in the wireless backhaul market (Joint Opposition at 165). Cable networks, however, are still not maximized to provide the dedicated bandwidth wireless carriers are demanding and their networks are not nearly as ubiquitous as the ILECs'.

⁴² See *SBC/AT&T Merger Order* at ¶¶ 39-40.

⁴³ This potential for cannibalization is significant given the advantage of scalable bandwidth available via Ethernet compared to the fixed bandwidths (DS1, DS3 and OCn) provided via TDM.

tied into onerous lock-up contracts that require the wireless provider to at least maintain, if not increase, its revenue commitment to AT&T from year to year and impose enormous penalties if the customer terminates early to move to an alternative backhaul provider. Those lock-up contracts, however, do not penalize wireless providers that transition their AT&T TDM-based services to AT&T fiber-based Ethernet services.

AT&T's economists state that T-Mobile today contracts with several non-ILEC providers of access service and that they "are not aware of any reason that other wireless carriers would not be able to contract with a similar range of CLECs, cable firms and other access providers."⁴⁴ One reason may be that AT&T's lock-up contracts severely limit the ability of wireless backhaul customers to buy some of their backhaul from AT&T and some from competitive providers. Under these contracts (or contract tariffs) the discounts are based on the customer's commitment to buy, during the term of the lock-up contract, all or virtually all of its access demand.⁴⁵ Were

⁴⁴ Carlton, *et al.*, Declaration at ¶ 118.

⁴⁵ See, e.g., Ameritech FCC Tariff No. 2 § 19.3(C)(2); National Regulatory Research Institute, "Competitive Issues in Special Access Markets," at 73 (Jan. 21, 2009) ("NRRI Report") (in AT&T Ameritech Discount Commitment Plan "buyers are not free to set their preferred commitment levels. A DCP buyer can commit to no less than 90% of the number of channel terminations in service when it makes the commitment," citing AT&T Ameritech FCC Tariff No. 2, § 7.4.13(B)); NRRI Report at 74 (with Term Payment Plan with portability commitment, AT&T sets the buyer's commitment level at 100% of the number of circuits the buyer currently purchases, citing AT&T SWBT Tariff No. 73, § 7.2.22(E)); Pacific Bell FCC Tariff No. 1, § 7.4.18(E) (for Term Payment Plan with portability, AT&T sets customer's commitment level at 100% of the number of circuits customer currently purchases); Pacific Bell FCC Tariff No. 1, § 22.3(C)(1) (customer's initial Minimum Annual Revenue Commitment is calculated based on total of previous three months recurring billing multiplied by four); Pacific Bell FCC Tariff No. 1, § 33.25.4(A) (customer's initial Minimum Annual Revenue Commitment set at total of previous three months revenues in Ameritech Operating Cos., SWBT and Pacific Bell multiplied by 4); Pacific Bell FCC Tariff No. 1, § 33.34.4(A) (customer's initial Minimum Annual Revenue Commitment calculated based on total of previous three month's recurring billing multiplied by 4); Pacific Bell FCC Tariff No. 1, § 33.112.5(A) (customer's initial Minimum Annual Revenue Commitment calculated based on current month's billing multiplied by 12); SWBT FCC Tariff 73, § 38.3(C) (customer's initial Minimum Annual Revenue

AT&T's economists unaware of the existence of these lock-up contracts or did they just not consider them a disincentive to purchase backhaul from an alternative provider?

C. AT&T Can Leverage Its Market Power To Raise Its Rivals Rates

In response to concerns that AT&T will use its market power in the wireline market to harm competition in the downstream retail wireless market, AT&T contends that it lacks the incentive to do so today, that it will lack the incentive to do so after the acquisition and that petitioners have failed to show that the acquisition will enhance AT&T's incentives to raise its rivals' backhaul prices.⁴⁶ AT&T's contentions are inconsistent with traditional competition doctrine.

The claim that AT&T currently lacks the incentive to raise its rivals' costs of competing in the wireless marketplace is simply not credible. AT&T enjoys a dominant position in the special access market that provides wireless backhaul, an essential input for retail wireless service. Like any dominant provider, AT&T will seek to maximize its profits. If it can maximize special access profits while also raising the costs of doing business for its wireless competitors, AT&T clearly has the incentive to do so. AT&T further asserts that the Commission rejected similar "raising rivals' costs" arguments in the *AT&T/BellSouth Merger*

Commitment calculated based on total of previous three months recurring billing multiplied by four); SWBT FCC Tariff No. 73, § 7.2.20 (DS1 Term Pricing Discount Plan requires a base level of DS-1 channel terminations and maintenance of 80% of that level for 3 years to receive a discount). Nevada Bell FCC Tariff No. 1, § 7.11.5.2 (for Term Payment Plan with portability, AT&T sets customer's commitment level at 100% of the number of circuits customer currently purchases); SNET FCC Tariff No. 39, § 2.11.1.1(D) (with Optional Payment Plan customer's initial commitment is set at 100% of circuits purchased the month before the commitment).

⁴⁶ Joint Opposition at 173-174.

*Order*⁴⁷ and the *AT&T Wireless/Cingular Merger Order*.⁴⁸ Those cases are distinguishable. The AT&T/BellSouth merger did not involve any reduction in the number of competitors in the wireless market because AT&T and BellSouth already jointly owned Cingular.⁴⁹ At the time of the AT&T/Cingular merger, there were other independent wireless carriers in the market that no longer exist today, including Nextel, Alltel, Centennial and Dobson. The market for wireless services is very different today with AT&T and Verizon holding dominant positions in the market, followed by much smaller, although national, rivals like Sprint and T-Mobile. In any event, while the Commission said that it would address any issues relating to special access pricing and provisioning in the pending rulemaking proceeding when it approved the AT&T/Cingular merger,⁵⁰ that was seven years ago and the Commission still has not acted or addressed those issues. COMPTTEL agrees that the Commission should resolve the generic issues relating to special access pricing and provisioning in the context of the rulemaking proceeding, but the Commission cannot continue to ignore AT&T's ability and incentive to protect its market power in the downstream wireless market by raising its rivals' prices for the essential backhaul input when evaluating whether its acquisition of T-Mobile will serve the public interest.

⁴⁷ *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar. 26, 2007).

⁴⁸ See Joint Opposition at 175. *In the Matter of the Applications of AT&T Wireless, Inc. and Cingular Wireless for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion And Order, FCC 04-255 (rel. Oct. 26, 2004).

⁴⁹ *AT&T/BellSouth Order* at ¶¶9, 13.

⁵⁰ *In the Matter of the Applications of AT&T Wireless, Inc. and Cingular Wireless for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion And Order, FCC 04-255 at ¶183 (rel. Oct. 26, 2004).

Industry observers have predicted that AT&T's acquisition of T-Mobile will lead to further consolidation by Verizon in an effort to keep with up AT&T. This dynamic provides both AT&T and Verizon with increased incentive to use their hegemony in the special access market to raise their rivals' costs. It also increases the incentive for Verizon and AT&T to coordinate actions to maintain their market dominance.⁵¹

AT&T also asserts that it lacks the incentive to raise backhaul prices because such a move would cause its remaining wireless competitors to "lower output or choose alternative backhaul suppliers."⁵² As COMPTTEL explained in its Petition, however, the removal of T-Mobile as a backhaul purchaser will suppress competition in the backhaul market and thereby insulate AT&T from competitive threats if it raises its prices. Moreover, basic principles of economics provide that it is natural for market participants (especially in a declining cost industry) to try to get their competitors to "lower output," because the less of the demand that competitors fill, the more of the demand, and the higher the price, that will accrue to them. AT&T certainly has the incentive is to maximize profits from the over 40 percent share of the wireless retail market that it will control post-acquisition and one way of doing so is to take steps to force its competitors to "lower output," thereby shifting demand — and increased profits— to AT&T.

⁵¹ See Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1429a (2d edition 1998-2006 and supp. Sep. 2006).

⁵² Joint Opposition at 176.

CONCLUSION

For the foregoing reasons and those set forth in COMPTEL's Petition To Deny, COMPTEL respectfully requests that the Commission deny AT&T's Applications to acquire T-Mobile.

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